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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

No. 74-882

LEONOR ALBERTI DE CANAS and
MIGUEL CANAS, *Petitioners,*

vs.

ANTHONY G. BICA and JUAN SILVA, *Respondents.*

On Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District

BRIEF OF RESPONDENTS

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BRIEF OF RESPONDENTS

QUESTION PRESENTED

Is Section 2805 of the California Labor Code an unconstitutional attempt to encroach upon the Federal scheme of immigration and foreign affairs?

STATEMENT OF THE CASE

Petitioner sought injunctive relief and damages pursuant to Section 2805, California Labor Code. A demurrer without leave to amend was sustained on February 14, 1973. The Court of Appeals, Second

Appellate District, State of California, affirmed on July 26, 1973. Petition for hearing by the California Supreme Court was denied on October 24, 1974. The United States Supreme Court granted the petition for a Writ of Certiorari on June 23, 1975.

SUMMARY OF ARGUMENT

States cannot legislate in the field of immigration and naturalization, even absent Congressional legislation. Immigration is a field which is reserved to the Federal government. The Federal government has completely occupied this field by passage of the Immigration and Nationality Act of 1952, as amended in 1965. Section 2805 of the California Labor Code is in direct conflict with 8 USC §1324(a), Immigration and Nationality Act of 1952, as amended in 1965.

ARGUMENT

STATES CANNOT LEGISLATE IN AREAS WHICH INTERFERE WITH THE FOREIGN AFFAIRS OF THE UNITED STATES OR WHICH AFFECT THE FEDERAL SCHEME OF IMMIGRATION AND NATURALIZATION.

A. Foreign affairs and Immigration and Naturalization are areas in which there is such an overpowering Federal interest that states are foreclosed from intrusion.

The United States Constitution provides, in Article I, Section 8, clause 4:

> "The Congress shall have the Power . . . to establish a uniform rule of Naturalization . . ."

This power is exclusive.

There is no direct mandate in the United States Constitution dealing with the power to regulate immigration. The federal government did not adopt immigration restrictions for its first 100 years. However, whenever states attempted to control immigration, their attempts were struck down under the theory that the regulation of immigration concerned foreign commerce and this was an area exclusively that of the federal government. *The Passenger Cases (Smith v. Turner)* 48 U.S. 283, (1849); *Henderson v. Mayor of New York,* 92 U.S. 259, (1875); *Chy Lung v. Freeman,* 92 U.S. 75, (1875); Gordon and Rosenfield, Immigration Law and Procedure, Vol. 1, pages 1-27.

In subsequent decisions this Court enlarged the scope of federal power in this area, and stated that the power to regulate immigration was implied from two sources. The first source of implied power is from the specific directives in the Constitution to regulate foreign commerce,[1] declare war,[2] make treaties,[3] establish a uniform rule of Naturalization,[4] prohibit the importation of persons,[5] and to make all necessary and proper laws.[6] The second source of implied powers to regulate immigration is as an incident of national sovereignty without any specific grant in the Constitution. *Chae Chan Ping v. U.S.,* 130 U.S. 581 (1889);

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[1] Article I, § 8.
[2] Article I, § 8.
[3] Article VI.
[4] Article I, § 8.
[5] Article I, § 9.
[6] Article I, § 8.

Ekiu v. U.S., 142 U.S. 651 (1892). In *Ekiu v. U.S.*, the Court stated at page 659:

> "It is an accepted maxim of international law, that every sovereign nation has the power, as inherent sovereignty, and essential to self preservation to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."

Congress and the Federal government are not unaware of the problem of the illegal alien.[7] Petitioner's brief, pages 8-14, depicts the magnitude of the problem. The ultimate objective of 2805 of the Labor Code[8] is

[7]It should be noted that 2805 of the Labor Code deals with "aliens not entitled to lawful residence if such employment would have an adverse effect on lawful resident workers." Petitioner has attempted to reduce this to "illegal aliens", which of course it is not as will be shown later. While the issue is not before this court now, 2805 of the Labor Code is also probably unconstitutional on Due Process grounds, i.e., it is a criminal statute which is so vague that an ordinary man will not know how to conform to its prohibitions. How is an employer to determine lawful residence? When does such employment have an adverse effect—on a daily, weekly, monthly basis? If there is a labor shortage in Northern California, are employers there allowed to hire aliens not entitled to lawful residence, while those in Southern California are not? If a particular industry has a labor shortage which cannot be filled by the domestic labor market, may those employers hire aliens not entitled to lawful residence?

[8]Section 2805 of the California Labor Code reads as follows:

"(a) No employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers.

"(b) A person found guilty of violation of subdivision (a) is punishable by a fine of not less than two hundred dollars ($200.00) nor more than five hundred dollars ($500.00) for each offense.

"(c) The foregoing provisions shall not be a bar to civil action against the employer based upon a violation of subdivision (a)."

to expel all "aliens not entitled to lawful residence" from California. They will migrate to the other states of the Union or to the Republic of Mexico or Canada.[9] This amounts to a regulation of immigration and is not permitted by the individual states. It will also cause severe problems with foreign governments (particularly Mexico) concerned about the treatment of their nationals inside this country.

This Court has consistently held that individual states may not interfer with the Federal Government's foreign affairs and its regulation of aliens. *Hines v. Davidowitz,* 312 U.S. 52, (1940), *U.S. v. Pink,* 315 U.S. 203 (1942), *Kolovrat v. Oregon,* 366 U.S. 187 (1961), *Zschernig v. Miller,* 389 U.S. 429 (1968), *Graham v. Richardson,* 403 U.S. 365 (1971).

One commentator suggests that the Federal interest in foreign affairs is so strong that it forecloses any recognition of corresponding state interests. Note: *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court,* 75 Colum. L. Rev. 637.

This Court in *Truax v. Raich,* 239 U.S. 33, (1915) held that an Arizona law, which effectively deterred interstate migration of aliens by imposing a substantial limitation on employment opportunities interfered with the power of the federal government to

[9]It is also possible that those terminated would seek general welfare assistance. If such assistance were denied, they would again be forced to migrate to Mexico, Canada, or throughout the other states of the Nation. If the assistance were obtained, then 2805 of the Labor Code would be subverting California's legitimate interest in promoting self-reliance and assuring that limited state welfare funds be spent on behalf of those genuinely incapacitated and most in need.

admit persons to this country under acts of Congress. At page 42, 239 U.S., the Court states:

> "The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal government."

Labor Code Section 2805 likewise seeks to control immigration into the State of California and the migration of aliens interstate by seeking to abolish their employment opportunities.[10]

B. Even assuming that states could legislate in the field of immigration and naturalization absent federal legislation, the Immigration and Nationality Act of 1952, as amended in 1965, effectively precludes any state legislation.

Congress specifically intended to completely occupy the field of Immigration. This includes the right to exclude aliens at the border and to expel such aliens as it desires from within its borders and in which ways it wants the aliens expelled. U.S. Code, Cong. & Admin. News, 1952, pages 1653-1755. The House Report (No. 1365) discusses the power of Congress at pages 1653-1655 and contains the following:

> "The expulsion of aliens is a *sovereign power* necessary to the safety of the country, to be regulated by the *legislative* department." (Emphasis added).

[10]Petitioners may contend that the situation is unlike *Truax v. Raich* because Section 2805 only deals with aliens not entitled to lawful residence while *Truax* applied to aliens otherwise lawfully admitted into the United States. Analytically this is incorrect, because there may be some time, either at the present or in the future, when employment of aliens not entitled to lawful residence would not have an adverse effect on lawful resident workers. If that situation arose, then it would not be a violation of Section 2805 to hire an alien not entitled to lawful residence and California would actually be encouraging the entry of aliens not entitled to lawful residence. This again amounts to an attempt to control immigration.

The Act itself provides that the Attorney General shall be charged with the administration and enforcement of the Act and all other laws relating to the immigration and naturalization of aliens, except insofar as the Act or other laws relate to the powers, functions, and duties conferred upon the President, the Secretary of State, the officers of the Department of State or diplomatic or counsular officers. 8 USC §1103.

This is not a case involving historic police powers of the States. *Florida Lime and Avocado Growers, Inc. v. Paul,* 373 U.S. 132. It is a subject by its own very nature admitting only of national supervision. *Cooley v. Board of Port Wardens,* 12 How. 299, 319-320. It is also a subject demanding exclusive federal regulation in order to achieve uniformity vital to national interests. *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 241-244.

Pennsylvania v. Nelson, 350 U.S. 497 (1955), declared the test to be used to determine whether the federal government has so occupied a field that a state cannot legislate in that area.

> "First, the scheme of federal regulation is so persuasive as to make reasonable the inference that Congress left no room for the states to supplant it." Page 502.
>
> "Second, the federal statutes touch a field in which the federal interest is so dominant that the federal system must be assumed to preclude en-

forcement of state laws on the same subject." Page 504.

"Third, enforcement of State Sedition Act presents a serious danger of conflict with the administration of the federal program." Page 505.

In *Pennsylvania v. Nelson,* supra, the State of Pennsylvania had enacted the Pennsylvania Sedition Act. This Court held that the federal government by enacting the Smith Act of 1940, and amending it in 1948, invalidated the state law under the doctrine of federal suppression.

It must be conceded that Congress has enacted a comprehensive scheme for immigration and nationality. The Immigration and Nationality Act of 1952 is found at 8 USC § 1101 et seq. It was passed over President Truman's veto on January 27, 1952. U.S. Code, Cong. & Admin. News, 1952, page 276. The volume and subject matter alone indicate the comprehensiveness of the Act. Congress thought that it was enacting a comprehensive law as the committee states at page 1653 U.S. Code, Cong. & Admin. News, 1952:

"Purpose of the Bill

The purpose of the bill is to enact a comprehensive, revised immigration, naturalization and nationality code."

By virtue of the comprehensive legislation in this area, the State of California is precluded from also legislating. Clearly the tests of *Nelson* are met, and Section 2805 must fall. First, the scheme of federal regulation is so pervasive as to make reasonable the

inference that Congress left no room for the states to supplement it. Second, as was shown previously in Part A of this brief, the federal statutes touch a field in which the federal interest is so dominant that the federal system must be assumed to preclude enforcement of same laws on the same subject. Third, the enforcement of the state act presents a serious danger of conflict with the administration of the federal program as it could expel masses of aliens not entitled to lawful residence to other states and across international borders. As Justice Holmes said in *Charleston & W. C. R. Co. v. Varnville Furniture Co.,* 237 U.S. 596 (1914):

"When Congress has taken a particular subject matter in hand, coincidence is as ineffective as opposition, and the state law is not to be declared a help because it attempts to go further than Congress has seen fit to go."

In addition, there are statutory provisions and administrative decisions which compel the result that this field has been completely occupied.

There are many statutory classifications of aliens who are permitted employment but are not entitled to lawful residence. Among these are:

8 USC 1101(a)(15)(A) An ambassador, public minister, or career diplomat who has been accredited by a foreign government recognized de jure by the United States and the members of the alien's immediate family may work and may employ necessary personal employees.

Subsection (iii) recognizes the right to work of attendants, servants, personal employees and members

of the immediate families and employees who have a non-immigrant status under Section (A) above.

Subdivision (B) thereof, an alien having a residence in a foreign country which he has no intention of abandoning, and who is visiting the United States temporarily for business may be employed in the United States without having residence here.

Subdivision (D) thereof, an alien crewman serving on board a vessel or aircraft is permitted employment.

Subdivision (E) thereof, an alien entitled to enter the United States under and in pursuance of the provisions of a treaty of Commerce and Navigation between the United States and a foreign state of which he is a national; or (i) solely to carry out substantial trade principally between the United States and the foreign State of which he is a national; or (ii) solely to develop and direct the operations of an enterprise in which he has invested or of an enterprise of which he is actively in the process of investing, substantial amounts of capital. These are properly known as treaty traders and treaty investors.

Subdivision (F)(i) permits an alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study may work while pursuing his course of study, with the approval of the District Director of Immigration.

Subdivision (L) permits the intercompany transfer of aliens not entitled to lawful residence in order to continue to render his services to the same employer.

Also, there is a long line of decisions, beginning with *Muslemi v. Immigration and Naturalization Service,* 408 F.2d 1196 (9th Cir. 1969) which provides for relief from deportation of aliens who are in the United States fraudulently. *Godoy v. Rosenberg,* 415 F.2d 1266 (9th Cir. 1969); *Lee Fook Chuey v. Immigration and Naturalization Service,* 439 F.2d 244 (9th Cir. 1971); *United States v. Gostavo Osuna Picos,* 443 F.2d 907 (9th Cir. 1971); *Vitale v. Immigration and Naturalization Service,* 443 F.2d 907 (9th Cir. 1971). These cases all involve aliens who were relieved from deportation pursuant to 8 USC 1251(f)[11] and are eligible for employment.

The above are just a few of the people not entitled to lawful residence who are recognized as being entitled to employment.

Petitioner's contention that the Federal government is inviting the states to cooperate in a plan to punish employers for knowingly hiring illegal aliens is contradicted by actions taken by the U.S. Labor Department itself. In determining which employers would be permitted to secure labor certifications pursuant to 212(a)(14) (determination of adverse effect on domestic labor), the Labor Department adopted Regu-

[11]8 USC § 1251. Relationship to United States citizen or lawfully admitted alien as affecting deportation for fraudulent entry.

(f) The provisions of this section relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation shall not apply to an alien otherwise admissible at the time of entry who is the spouse, parent, or a child of a United States citizen or of an alien lawfully admitted for permanent residence.

lation 60.6(i) and (j) of 29 CFR on September 10, 1968. 33 Fed. Reg. No. 176, p. 12808.

In summary, 29 CFR 60.6(i)(2)(i)[12] provided that an employer would be denied a labor certification if he used an agent (or agency) who referred an illegal alien for employment within the previous 3 years. 29 CFR 60.6(j)[13] provided that a labor certification would be denied if an employer knowingly hired an illegal alien (alien who entered the United States without inspection) within three years.

On February 4, 1971, the U.S. Department of Labor withdrew both of these regulations. 36 Fed. Reg. No. 24, p. 2464. They have not been replaced with anything similar. The conclusion is inescapable. The Federal government, through the executive branch, is not going

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[12]29 CFR § 60.6 Matters to be considered.

Prospective employment offered in accordance with § 60.3(a) will be deemed to adversely affect "wages" or "working conditions" of American workers within the meaning of section 212(a)(14) of the Act unless it appears: • • •

(i) That such employment is not procured through an agent (or agency) which has within 3 years prior to the offer (1) concealed the extent of his participation in the placement of an alien, or (2) referred to employment an alien who (i) entered the United States without inspection, or (ii) was in the United States as a nonimmigrant and whose employment violated his nonimmigrant status, unless such agent demonstrates that he did not know, had no reasonable grounds to know, or could not be reasonable inquiry have ascertained knowledge of these circumstances.

[13]29 CFR § 60.6.

(j) That such employment is not with an employer who has within three years prior to the offer hired an alien who (1) entered the United States without inspection, or (2) was in the United States as a nonimmigrant and whose employment violated his nonimmigrant status, unless such employer demonstrates that he did not know, had no reasonable grounds to know, or could not by reasonable inquiry have ascertained knowledge of these circumstances.

to regulate immigration and foreign affairs by penalizing employers for knowingly hiring illegal aliens.

This attitude is expressed in 29 CFR 60.3(e)(2)[14] which states that an employer is not subject to a denial of certification on the ground of employing an alien who works without authorization.

Petitioner's reliance on 29 CFR 602.10(e)(3) is not well placed. That regulation applies only to employment in the Agricultural and Logging industry. 2805 of the Labor Code applies to all employment, as does 29 CFR 60.6.

A final example of the need for an exclusive federal regulatory scheme in this field is the status of approximately 130,000 South Viet Nam refugees in this country. They were admitted under 8 USC §1182(d)(5) of the Act which permits the Attorney General to grant entry on a parole status to aliens.[15] After

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[14]29 CFR § 60.3. Requests for certification.

(e) Forms: Application for Alien Employment Certification.

(2) Job Offer for Alien Employment—MA 7-50B (formerly ES-575B). This form provides for a description of the alien's prospective employment in the United States. It is to be completed by a prospective employer. (Because of changes in these regulations effectuated since the issuance of Form MA 7-50B, the note printed between items 3 and 4 of that form is modified to the extent that an employer is not subject to a denial of certification on the ground of employing an alien who works without authorization.

[15]USC § 1182(d)

(5) The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

two years, these aliens will be allowed to apply for an adjustment of status to an immigrant lawfully admitted for permanent residence. During this time, they are not entitled to lawful residence and would be unable to secure employment in California if Labor Code 2805 were enforced. Such a result would completely frustrate the Federal government's purpose in bringing the refugees to this country.

C. Section 2805 of the California Labor Code is unconstitutional because it is in direct conflict with the Immigration and Nationality Act of 1952, as amended in 1965.

Section 2805 should fall because it is an attempt to regulate immigration, *Henderson v. Mayor of New York,* supra, interfers with the foreign affairs of the Federal government, *Zschernig v. Miller,* supra, and because Congress has completely occupied the field of immigration, *Pennsylvania v. Nelson,* supra.

It must also fall under the theory of *Hines v. Davidowitz,* 312 U.S. 52, (1940). In *Hines,* supra, the State of Pennsylvania passed an alien registration law which required all aliens to register and carry alien identification cards. The federal government, in 1940, passed the Alien Registration Act. Davidowitz, an alien, filed an action to declare the Pennsylvania Act unconstitutional. He advanced two theories, summarized at 312 U.S. 59. First, the Pennsylvania Act encroached on a field reserved for the federal government. Second, it was a denial of equal protection. Justice Black, writing for the majority, restricted the ruling to: "Whether, by adoption of a comprehensive, integrated scheme for regulation of aliens, Congress

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has precluded state action." This was resolved in favor of Davidowitz, *Hines v. Davidowitz,* supra, page 62 and 63:

> "That the supremacy of national power in the general field of foreign affairs, including power of immigration, naturalization, and deportation, is made clear by the Constitution, was pointed out by the authors of the Federalist in 1787 (fn omitted). When the national government, by treaty or statute has established rules and regulations touching the rights, privileges, obligations, or burdens of aliens as such, the treaty or the statute is the supreme law of the land. No state can add to or take from the force in effect of such treaty or statute. . . ."

The opinion continues, at page 66 and 67:

> "And where the Federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law or enforce additional or auxiliary regulations (fn omitted)."

All that need be added to the present case is the substitution in the above statement of the word "employment" for the word "registration."

Petitioner maintains that Section 2805 is consistent with the Federal scheme of immigration. As such, Petitioner states that Section 2805 reinforces the policy expressed in 8 USC § 1182(a)(14), (applicants for

permanent admission), and 8 USC § 1101(a)(15)(H)(ii) (issuing of labor certificates to temporary workers who are non-immigrants and perform labor if unemployed workers in this country cannot be found).

It is obvious, however, that Section 2805 has nothing to do with either temporary employment of non-immigrants without visas or permanent admission of immigrants. It is directed solely at employers of "aliens not entitled to lawful residence." This area has also been specifically dealt with by Congress in 8 USC § 1324(a) which provides a comprehensive scheme for defining the crimes of transporting or harboring, or inducing entry of any alien not lawfully entitled to enter or reside within the United States. The statute itself emphasized that employment was not a violation of the Act. *"Provided, however,* etc."

The legislative history is not silent on this matter either. U.S. Code, Cong. & Admin. News, 1952, page 1724:

> "The committee wishes to state that employment (including the usual and normal practice incident to employment) shall not be deemed to constitute harboring, and, with this reservation, the committee strongly recommends the enactment of Section 274 [1324(a)] as amended."

Section 1324(a) was the subject of concern when the Immigration and Nationality Act of 1952 was under consideration. This was necessitated by the decision in *United States v. Evans,* 333 U.S. 483 (1948) which held that the penalty provisions under the Immigration Act of 1917 were inadequate to provide

a penalty for concealing or harboring aliens unlawfully in the United States. Section 1324(a) was rewritten so that concealing or harboring were violations of the Act. It is thus clear that Congress addressed itself squarely on the issue of employment of aliens not entitled to lawful residence and declared that it was not unlawful.

Petitioner places much reliance on the amendments to the Act which were made in 1965. However, those amendments address themselves to the issuing of visas to aliens seeking employment. 8 USC § 1182(a)(14) was amended to put the burden on the alien to establish that there were not sufficient workers in the United States at the alien's destination who are able, willing and qualified to perform the skilled or unskilled labor and that his employment would not adversely affect wages and working conditions of U.S. citizens similarly employed. U.S. Code, Cong. & Admin. News, 1965, pages 3333 and 3334. At page 3329 the Committee's report, Item No. 7 states:

> "7. Safeguards to protect the American economy from job competition and from adverse working standards as a consequence of immigrant workers entering the labor market are strengthened."

This, of course, has nothing to do with employment of aliens not entitled to lawful residence. Had the petitioner charged that the Secretary of State was issuing visas contrary to the provisions of 8 USC § 1182(a)(14) or labor certificates pursuant to § 1101(a)(15)(H)(ii) then he could seek relief in Federal District Court.

Petitioner would have the Court believe that by amending 8 USC § 1182(a)(14), Congress was inviting the individual states to pass laws which would restrict the employment of aliens not entitled to lawful residence in the United States. There is a major problem with such a theory. Congress would have had to address itself to the penalty provision chapter of the Immigration Title of the Act rather than the admission qualifications chapter. It then would have had to delete the employment exemption and/or create a new crime, namely that of employing aliens not entitled to lawful residence. It did neither of these. It did examine the penalty provision chapter and amended 1322(a) to bring it into conformity with § 1182(a)(14). U.S. Code, Cong. & Admin. News, 1955, page 3344 (Section 18).

Congress is not ignorant of the problem of employment of aliens not entitled to lawful residence. On May 3, 1973, the House of Representatives passed H.R. 982.[16] The section of concern for this case of H.R. 982 is Section 2. The bill amends 8 USC § 1324 (a) to provide a penalty for knowingly employing any alien not lawfully admitted to the United States for permanent residence. It involves a three-step procedure in which an employer is first cited, then fined civilly, and finally charged with a misdemeanor on the third offense. (H.R. 8713, pages 3, 4 and 5).

[16]H.R. 982 has been reintroduced in this session of Congress again as H.R. 982. It was re-numbered H.R. 8713 and passed out of the Judiciary Committee on July 30, 1975.

Some relevant portions of the committee (judiciary) report (93-108 to accompany H.R. 982, 93rd Congress, 1st Session) include:

> "Since under present law there is no prohibition on the employment of illegal aliens . . ." page 6.
>
> "The original legislation before the Committee (H.R. 2328, 92nd Congress, which was introduced at the request of the administration), would have provided a $1,000 fine and/or one year imprisonment for a first violation. The Committee reviewed this approach as too severe, and recognized the possibility of employment discrimination if criminal penalties were initially imposed. Consequently the Committee rejected this approach and instead, substituted the graduated three-step procedure for the imposition of sanctions." Pages 12 and 13.
>
> "Not only is the employment of unlawful aliens not illegal under present law, but such employment actually appeared to be condoned by the existing proviso in Section 274(a)(4) [1324 (a)(4)] that employment shall not be deemed to constitute the harboring of illegal aliens." Page 15.
>
> "Moreover, despite the fact that eight out of ten illegal aliens apprehended are Mexican natives, the problem is no longer restricted to the agricultural and border area of the Southwestern United States. Increasingly, illegal aliens travel, or arrange to be transported, to all of the metropolitan areas in the United States, where they can obtain higher-paying jobs in industry and, at the same time, more easily escape detection by Immigration authorities." Page 5.

It is clear that Congress has carefully considered the problem of employment of aliens not entitled to lawful residence. It is also clear that Congress has made the express determination that such employment is not unlawful. It may decide to alter this position in the future, but that is a matter strictly within its jurisdiction, and not that of the individual States. Section 2805 of the Labor Code is not an aid to the federal scheme, but is in direct conflict with it and is invalid.

Petitioner's statement that the passage of the amendments to the Farm Labor Contractor Registration Act of 1963 is an expression of Congressional intent to control the employment of illegal aliens is in error. 2805 of the Labor Code applies to all employers in the State of California. The Farm Labor Contractor Registration Act applies only to farm labor contractors. Congress is well aware that employment of aliens not entitled to lawful residence is permitted. By restricting the prohibition of employing aliens not entitled to lawful residence to farm labor contractors, it is affirming its long-held position that all other employers are not to be punished for the employment of aliens not entitled to lawful residence.

Recent decisions of this Court must be analyzed to determine whether 2805 of the Labor Code is a valid expression of a state interest or an intrusion into an area taken by the Federal government.

Petitioner's reliance on *Goldstein v. California,* 412 U.S. 546 (1973); *New York State Department of*

Social Services v. Dublino, 413 U.S. 405 (1973); *Merrill Lynch, Pierce, Fenner and Smith v. Ware,* 414 U.S. 117 (1973); and *Kewanee Oil Co. v. Bicron Corp.,* 416 U.S. 470 (1974) are distinguishable on subject matter grounds. *Goldstein v. California,* supra, dealt with the preemptive scope of the copyright clause; *New York State Department of Social Services v. Dublino,* supra, involved the Work Incentive Program of the Social Security Act; *Merrill Lynch, Pierce, Fenner and Smith v. Ware, supra,* dealt with an arbitration rule promulgated by the New York Stock Exchange; *Kewanee Oil Co. v. Bicron Corp.,* supra, was concerned with federal patent laws and Ohio's trade secret laws.

None of the above cases concerned aliens, immigration, or foreign affairs. Indeed, this Court has consistently refused to let the individual states operate in these areas. *Graham v. Richardson,* supra; *Zschernig v. Miller,* supra, *Kolovrat v. Oregon,* supra; *Pennsylvania v. Nelson,* supra; *Hines v. Davidowitz,* supra; *Takahashi v. Fish & Game Commissioner of California,* 334 U.S. 410 (1948); *Truax v. Raich,* 239 U.S. 33; *Henderson v. Mayor of New York,* supra; *Ekiu v. U.S.,* supra; *Chy Lung v. Freeman,* supra, *Chae Chan Ping v. U.S.,* supra.

The aforementioned cases are also distinguishable on analytical grounds. In *Goldstein v. California,* supra, there was the absence of a federal statute to allow federal copyright protection of recordings, 412 U.S. 546, 552. Also, the subject matter to which the Copyright Clause is addressed may be of purely local

importance and not worthy of national attention. 412 U.S. 546, 558. In *Kewanee Oil Co. v. Bicron,* supra, this court again found the essentially nonuniform character of the appreciation of intellectual achievements in the various states and held that states may hold diverse viewpoints in protecting intellectual property relating to inventions. 416 U.S. 470, 479. The Court found no conflict with the operation of federal laws, and noted that trade secret law and patent law have co-existed in this country for over one hundred years. 416 U.S. 470, 493.

In *Merrill Lynch, Pierce, Fenner & Smith v. Ware,* supra, the Court found that the purpose of the Securities Exchange Act was to insure fair dealing and protect investors from harmful or unfair trading practices. 414 U.S. 117, 130. The arbitration rule in question was found not needed as part of a uniform national regulation and was described as a housekeeping rule which was not necessary for the achievement of the national policy objectives. 414 U.S. 117, 136. In *New York State Department of Social Services v. Dublino,* the Court found no clear intent to supersede state law, 413 U.S. 405, 413; that states have considerable latitude in allocating their AFDC resources, since each state was free to set its own standard of need and determine the level of benefit by the amount of funds it devotes to the program, 413 U.S. 405, 414 (citations omitted). The Court also noted that 21 states had initiated welfare work requirements as a condition of AFDC eligibility when the federal work incentive program was passed by Congress. 413 U.S. 405, 414. The State of New York

and the federal government also had a complementary administrative framework. 413 U.S. 405, 421.

The present case offers none of these factors in opposition to preemption. There is a comprehensive federal act and administrative agency while there are no corresponding state laws or agencies concerning the same subject; there is a clear statement of Congressional intent to totally occupy and preempt the field; and most important, there is an overwhelming need for a uniform national policy in these areas. There is no area which lends itself more to the constitutional doctrine of preemption than regulation of aliens, immigration, and foreign affairs. Other recent decisions of this court have upheld preemption in fields which are national in character. *Perez v. Campbell,* 402 U.S. 637 (1971). Federal Bankruptcy Act preempts motor vehicle responsibility statute; *Motor Coach Employees v. Lockridge,* 403 U.S. 274 (1971), comprehensive national labor law preempts state court jurisdiction; *Burbank v. Lockheed Air Terminal,* 411 U.S. 624 (1973), Federal Aviation Agency and Environmental Protection Agency preempt state control of aircraft noise.

If there is one subject which does not lend itself to diverse treatment by the various States, it is that of immigration and foreign affairs. *Hines v. Davidowitz,* supra; *Chae Chan Ping v. U.S.,* supra, at page 606:

> "For local interests, the several States of the Union exists; but for international purposes, embracing our relations with foreign nations, we are but one people, one nation, one power."

CONCLUSION

In summary, it is respondents' contention that Section 2805 of the California Labor Code is unconstitutional under three separate and distinct theories of preemption.

First, it attempts to regulate immigration and foreign affairs and is unconstitutional because that is a subject matter over which the federal government has exclusive jurisdiction.

Second, assuming arguendo, that the States had concurrent juridiction over immigration and nationality, Section 2805 is unconstitutional because Congress has enacted a comprehensive scheme and left no room for the individual states to legislate.

Third, Congress has addressed itself to the specific area that Section 2805 does, namely penalties for the employment of aliens not entitled to lawful residence. It has expressly stated that such employment is not unlawful. Section 2805 is in direct conflict with this policy and is invalid.

Dated, Berkeley, California,
September 17, 1975.

Respectfully submitted,
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(Appendix Follows)

APPENDIX

Appendix

1. Section 2805 of the California Labor Code reads as follows:

> "(a) No employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers.
>
> "(b) A person found guilty of violation of subdivision (a) is punishable by a fine of not less than two hundred dollars ($200.00) nor more than five hundred dollars ($500.00) for each offense.
>
> "(c) The foregoing provisions shall not be a bar to civil action against the employer based upon a violation of subdivision (a)."

2. 8 USC 1101. Definitions

8 USC 1101 (a) (15) The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens

(A) (i) an ambassador, public minister, or career diplomatic or consular officer who has been accredited by a foreign government recognized de jure by the United States and who is accepted by the President or by the Secretary of State, and the members of the alien's immediate family;

. . .

(iii) upon a basis of reciprocity, attendants, servants, personal employees, and members of their immediate families, of the officials and employees who have a nonimmigrant status under (i) and (ii) above;

(B) an alien (other than one coming for the purpose of study or of performing skilled or unskilled labor or as a representative of foreign press, radio, film, or other foreign information media coming to engage in such vocation) having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure;

(D) an alien crewman serving in good faith as such in any capacity required for normal operation and service on board a vessel (other than a fishing vessel having its home port or an operating base in the United States) or aircraft, who intends to land temporarily and solely in pursuit of his calling as a crewman and to depart from the United States with the vessel or aircraft on which he arrived or some other vessel or aircraft;

(E) an alien entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national, and the spouse and children of any such alien if accompanying or following to join him: (i) solely to carry on substantial trade, principally between the United States and the foreign state of which he is a national; or (ii) solely to develop and direct the operations of an enterprise in which he has invested, or of an enterprise in which he is actively in the process of investing, a substantial amount of capital;

(F) (i) an alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who seeks to

enter the United States temporarily and solely for the purpose of pursuing such a course of study at an established institution of learning or other recognized place of study in the United States, particularly designated by him and approved by the Attorney General after consultation with the Office of Education of the United States, which institution or place of study shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant student, and if any such institution of learning or place of study fails to make reports promptly the approval shall be withdrawn, and (ii) the alien spouse and minor children of any such alien if accompanying him or following to join him;

(L) an alien who, immediately preceding the time of his application for admission into the United States, has been employed continuously for one year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States temporarily in order to continue to render his services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge, and the alien spouse and minor children of any such alien if accompanying him or following to join him.

3. 8 USC 1103. Power and duties of the Attorney General and Commissioner; appointment of Commissioner

(a) The Attorney General shall be charged with the administration and enforcement of this chapter

and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: *Provided, however,* That determination and ruling by the Attorney General with respect to all questions of law shall be controlling. He shall have control, direction, and supervision of all employees and of all the files and records of the Service. He shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions,[1] and perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter. He is authorized, in accordance with the civil-service laws and regulations and chapter 51 and subchapter III of chapter 53 of Title 5, to appoint such employees of the Service as he deems necessary, and to delegate to them or to any officer or employee of the Department of Justice in his discretion any of the duties and powers imposed upon him in this chapter; he may require or authorize any employee of the Service or the Department of Justice to perform or exercise any of the powers, privileges, or duties conferred or imposed by this chapter or regulations issued thereunder upon any other employee of the Service. He shall have the power and duty to control and guard the boundaries and borders of the United States against the illegal entry of aliens and shall, in his discretion, appoint for that purpose such number of employees of the Service as to him shall appear

necessary and proper. He is authorized to confer or impose upon any employee of the United States, with the consent of the head of the Department or other independent establishment under whose jurisdiction the employee is serving, any of the powers, privileges, or duties conferred or imposed by this chapter or regulations issued thereunder upon officers or employees of the Service. He may, with the concurrence of the Secretary of State, establish officers of the Service in foreign countries; and, after consultation with the Secretary of State, he may, whenever in his judgment such action may be necessary to accomplish the purposes of this chapter, detail employees of the Service for duty in foreign countries.

4. 8 USC 1182(a) (14) provided (1952-1965) for the exclusion of admission the following class of aliens: "Aliens seeking to enter the United States for the purpose of performing skilled or unskilled labor, if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) sufficient workers in the United States who able, willing, and qualified are available at the time (of application for a visa and for admission to the United States) and place (to which alien is destined) to perform such skilled or unskilled labor or (B) the employment of such aliens will adversely affect the wages and working conditions of the workers in the United States similarly employed."

5. 8 USC 1182(a) (14) provides (1965-present) for the exclusion of admission the following class of

aliens: "Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed . . ."

6. 8 USC 1182(d):

(5) The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

7. 8 USC 1251 Relationship to United States citizen or lawfully admitted alien as affecting deportation for fraudulent entry.

(f) The provisions of this section relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation shall not apply to an alien otherwise admissible at the time of entry who is the spouse, parent, or child of a United States citizen or of an alien lawfully admitted for permanent residence.

8. 8 USC 1324 "(a) Any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who—

(3) willfully or knowingly conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, in any place, including any building or any means of transportation; or

(4) willfully or knowingly encourages or induces, or attempts to encourage or induce, either directly or indirectly, the entry into the United States of—any alien, including an alien crewman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this act or any other law relating to the immigration or expulsion of aliens, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $2,000 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection

occurs: *Provided, however,* that for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring."

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9. 29 CFR § 60.3 Requests for certification.

(e) Forms: Application for Alien Employment Certification.

(2) Job Offer for Alien Employment—MA 7-50B (formerly ES-575B). This form provides for a description of the alien's prospective employment in the United States. It is to be completed by a prospective employer. (Because of changes in these regulations effectuated since the issuance of form MA 7-50B, the note printed between items 3 and 4 of that form is modified to the exent that an employer is not subject to a denial of certification on the grounds of employing an alien who works without authorization).

29 CFR § 60.6 (1969) Matters to be considered.

Prospective employment offered in accordance with § 60.3(a) will be deemed to adversely affect "wages" or "working conditions" of American workers within the meaning of section 212(a)(14) of the Act unless it appears: * * *

(i) That such employment is not procured through an agent (or agency) which has within 3 years prior to the offer (1) concealed the extent of his participation in the placement of an alien, or (2) referred to

employment an alien who (i) entered the United States without inspection, or (ii) was in the United States as a nonimmigrant and whose employment violated his nonimmigrant status, unless such agent demonstrates that he did not know, had no reasonable grounds to know, or could not by reasonable inquiry have ascertained knowledge of these circumstances; and

(j) That such employment is not with an employer who has within three years prior to the offer hired an alien who (1) entered the United States without inspection, or (2) was in the United States as a nonimmigrant and whose employment violated his nonimmigrant status, unless such employer demonstrates that he did not know, had no reasonable grounds to know, or could not be reasonable inquiry have ascertained knowledge of these circumstances.

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10. H.R. 8713. SEC. 2. Section 274 of the Immigration and Nationality Act (8 U.S.C. 1324) is amended by deleting the proviso in paragraph 4 of subsection (a) and by redesignating subsection (b) as subsection (e) and adding new subsections (b), (c), and (d) to read as follows:

"(b) (1) It shall be unlawful for any employer or any person acting as an agent for such employer, or any person who, for a fee, refers an alien for employment by such an employer knowingly to employ, continue to employ, or refer for employment any

alien in the United States who has not been lawfully admitted to the United States for permanent residence, unless the employment of such alien is authorized by the Attorney General.

"(2) If, on evidence or information he deems persuasive, the Attorney General, after affording an opportunity to respond to and rebut such evidence or information, reasonably concludes that an employer, or a person acting as an agent for such an employer, or any person who, for a fee, refers an alien for employment by such an employer, employs, continues to employ, or refers for employment any alien in the United States who has not been lawfully admitted for permanent residence, or any alien whose employment has not been authorized by the Attorney General, the Attorney General may serve a citation on the employer, agent, or referrer containing a notification that the alien's employment is not authorized and a warning of the penalties and injunctive remedy set forth in this section. The procedure prescribed by and the provisions of chapter 7 of title 5, United States Code, shall apply to and shall be the sole and exclusive procedure for the judicial review of a citation served by the Attorney General. An action for judicial review of a citation may be filed in the appropriate judicial district not later than sixty days from the date of issuance of the citation.

"(3) If, in a proceeding initiated within two years after the service of such citation, the Attorney General finds that any employer, agent, or referrer upon whom such citation has been served has there-

after violated the provisions of paragraph (1), the Attorney General shall assess a penalty of not more than $500 for each alien in respect to whom any violation of paragraph (1) is found to have occurred.

"(4) A civil penalty shall be assessed by the Attorney General only after the person charged with a violation under paragraph (3) has been given an opportunity for a hearing and the Attorney General has determined that a violation did occur, and the amount of the penalty which is warranted. The hearing shall be of record and conducted before an immigration officer designated by the Attorney General, individually or by regulation, and the proceeding shall be conducted in accordance with the requirements of title 5, section 554, of the United States Code.

"(5) If the person against whom a civil penalty is assessed fails to pay the penalty within the time prescribed in such order, the Attorney General shall file a suit to collect the amount in any appropriate district court of the United States. In any such suit or in any other suit seeking to review the Attorney General's determination, the suit shall be determined solely upon the administrative record upon which the civil penalty was assessed and the Attorney General's findings of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive.

"(c) Any employer or person who has been assessed a civil penalty under subsection (b) (3) which has become final and thereafter violates subsection (b) (1) shall be guilty of a misdemeanor and upon con-

viction thereof shall be punished by a fine not exceeding $1,000, or by imprisonment not exceeding one year, or both, for each alien in respect to whom any violation of this subsection occurs.

"(d) The district court of the United States shall have jurisdiction to enjoin violations of subsection (b) (1). Such actions may be brought by the Attorney General in any United States district court for a district wherein any act, omission, or transaction constituting the violation occurred, or any such court for the district wherein the defendant is found or transacts business."